SUPREME COURT, U.S.

FILED

G. ROBERT BLAKEY, CLERK

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1161

A. L. [redacted], et al.,
Petitioners,

versus

FIRST AMERICAN LIFE INSURANCE COMPANY,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals For The
Fifth Circuit


[redacted]
1400 City National Bank Building
Birmingham, Alabama 35203
[redacted]
515 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel
[redacted]
HOWARD WALTHALL
NEWMAN, LEIDESDORF & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203


St. Louis Law Printing Co., Inc., 415-17 N. Eighth St. [redacted]

## TABLE OF CONTENTS


| | Page |
|---|---|
| Authorities Cited | iii |
| Cases Cited | iii |
| Statutes Cited | iv |
| Rules and Regulations Cited | v |
| Other Authorities Cited | v |
| Prayer | 1 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented for Review | 2 |
| Relevant Statutes and Rules | 4 |
| Statement of the Case | 5 |
| Reasons for Granting the Writ | 9 |
| I. The decision below should be reviewed by this Court because it imposes undue burdens on the federal courts by requiring district courts to hold evidentiary hearings in stockholder litigation under the Federal Securities Acts to determine on a case-by-case basis whether the attorney-client privilege is available to the corporation against its own stockholders; it improperly requires a showing of "good cause" by stockholders to overcome the privilege; and requires district courts to "balance" the public interests involved in case-by-case decisions, and to give some undefined weight to state law in determining whether the privilege may be asserted by the corporation against its stockholders | 10 |

II. The decisions below present the novel question, never before decided by an American court, whether a corporation may invoke against its own stockholders the attorney-client privilege as to communications between the corporation's management and its attorney ..... 14

III. This Court should grant certiorari to decide the important question whether a corporation, which is not a natural person, may assert the attorney-client privilege ..... 17

IV. This Court should grant certiorari because one of the issues raised herein would be dispositive of Decker v. Harper & Row Publishers, Inc., No. 113, 1970 Term, now under submission in this Court ..... 19

Conclusion ..... 20

Appendices—

(a) Order of District Court below (District Judge H. H. Grooms, N. D. Ala. 1968) ..... A-1

(b) Opinion of the U. S. Court of Appeals for the Fifth Circuit below ..... A-3

(c) Rule 26(b)(1) of the Federal Rules of Civil Procedure (as amended in 1970) .....A-23

Rule 26(c) .....A-24

Rule 34 .....A-24

Rule 43(a) .....A-25

Section 46 of the Alabama Business Corporation Act .....A-26

Section 438, Title 7, Code of Alabama of 1940..A-27

Title 1, § 3, Code of Alabama (1960) .....A-27

# AUTHORITIES CITED

## Cases Cited

Baltimore & Pot. R. Co. v. Fifth Baptist Church, 108 U. S. 317 (1883) ..... 18

George Campbell Printing Corp. v. Reid, 392 U. S. 286 (1968) ..... 18, 19

Dahlke v. Morrison, CCH Fed. Sec. L. Rep., ¶92,690 (N. D. Ala., Oct. 3, 1969) ..... 15

Daniels v. Allen, 344 U. S. 443 (1953) ..... 18

Decker v. Harper & Row Publishers, Inc., Case No. 113, 1970 Term, U. S. Supreme Court ..... 18, 19, 20

Dennis & Sons, Ltd. v. West Norfolk Farmers Manure & Chemical Company, Ltd., 2 All E. R. 84, 112 L. J. Ch. 233, 169 L. T. 74, 39 TLR 288, 69 Sol. Jo. 211 (1943) ..... 15

Epstein v. Weiss, C. A. 67-233 (E. D. La., N. O. Div., May 13, 1970) ..... 16

Fischer v. Kletz, 266 F. Supp. 180 (S. D. N. Y. 1967) 7

Fischer v. Wolfinbarger, 45 F. R. D. 310 (W. D. Ky. 1968) ..... 15

Fischer v. Wolfinbarger, C. A. Nos. 3911 and 3919 (M. D. Tenn., Aug. 28, 1969) ..... 15

Garner v. First American Life Insurance Company, 289 F. Supp. 1018 (N. D. Ala. 1968), 430 F. 2d 1093 (5th Cir. 1970) ..... 1

Gouraud v. Edison Gower Bell Telephone Company of Europe, Limited, 57 L. T. Ch. 498, 59 L. T. 813 (1888) ..... 14, 15

Grand Trunk Western R. Co. v. H. W. Nelson Co., 116 F. 2d 823 (6th Cir. 1941) ..... 15

Hickman v. Taylor, 329 U. S. 495 (1947) ..... 12

Hogan v. Teledyne, Inc., C. A. 69C 1941 (N. D. Ill., April 22, 1970) ..... 15, 16

Jackson v. Ludeling, 21 Wall. 616 (1874) ..... 15

Parish v. Gates, 29 Ala. 254 (1856) ..... 15

Pattie Lea, Inc. v. District Court, 432 P. 2d 17 (Sup. Ct. of Colo. en banc 1967) ..... 16

Pepper v. Litton, 308 U. S. 295 (1939) ..... 15

Radiant Burners, Inc. v. American Gas Association, 207 F. Supp. 771 (N. D. Ill., 1962), reversed, 320 F. 2d 314 (7th Cir. 1963), cert. denied, 375 U. S. 929 (1963) ..... 18

Southern P. Co. v. Bugert, 250 U. S. 483 (1919) ..... 15

Talbott v. Marshfield, 2 Dr. & Sm. 549 (1865) ..... 15

Taylor v. Standard Gas & Elec. Co., 306 U. S. 307 (1939) ..... 15

In the Matter of Touche, Niven, Bailey & Smart, 37 S. E. C. 629 (1957) ..... 7, 8

Twin-Lick Oil Co. v. Marbury, 91 U. S. 587 (1876) .. 15

United States v. Louisville & Nashville R. R., 236 U. S. 318 (1915) ..... 18

Wilshire Oil Co. v. Riffe, 409 F. 2d 1277 (10th Cir. 1969) ..... 17

## Statutes Cited

Title 1, § 3, Code of Alabama of 1940 ..... 4, 8

Title 7, § 438, Code of Alabama of 1940 ..... 4

Alabama Securities Act, General Acts of Alabama, 1959, p. 1313, et seq., reproduced in pocket part of unofficial 1958 Recompilation of Code of Alabama 1940 as Title 53, §§ 28, et seq. ..... 5

Investment Company Act of 1970, 15 U. S. C., §§ a-1, et seq. ..... 5

28 U. S. C., § 1254(1) ..... 2

28 U. S. C., § 1292(b) ..... 6

Securities Act of 1933, 15 U. S. C., §§ 77a, et seq. ... 5

Securities Exchange Act of 1934, 15 U. S. C., §§ 78a, et seq. ..... 5

Section 68, Alabama Business Corporation Act, General Acts of Alabama, 1959, p. 1073, reproduced in pocket part of 1958 unofficial Recompilation of Code of Alabama, 1940 as Title 10, § 21(68) ..... 4

## Rules and Regulations Cited

Rule 26(b)(1), Federal Rules of Civil Procedure ..... 4

Rule 26(c), Federal Rules of Civil Procedure .....3, 4, 13

Rule 34, Federal Rules of Civil Procedure .....4, 12, 13

Rule 43(a), Federal Rules of Civil Procedure ..... 4

Rule 10b-5, Securities and Exchange Commission .. 5

## Other Authorities Cited

Advisory Committee, Explanatory Statement Concerning Amendments of the Discovery Rules, 48 F. R. D. 487 ..... 12

Bittker, "Professional Service Organizations: A Critique of the Literature," 23 Tax Law Rev. 429 (May 1968) ..... 7

Case Comment (Wilshire Oil v. Riffe), 83 Harv. L. Rev. 943 (1970) ..... 17

Proposed Rules of Evidence for the United States District Courts and Magistrates, March 12, 1969, 46 F. R. D. 161 .....14, 18

Scott, Law of Trusts (2d ed.), p. 1294 ..... 15

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. .....

A. L. GARNER, et al.,
Petitioners,

versus

FIRST AMERICAN LIFE INSURANCE COMPANY,
Respondent.

## PETITION FOR A WRIT OF CERTIORARI
### To The United States Court of Appeals For The Fifth Circuit

Petitioners A. L. Garner, *et al.* (plaintiffs and appellees below) pray for a Writ of Certiorari to review the August 31, 1970 opinion and judgment of the United States Court of Appeals for the Fifth Circuit.

### OPINIONS BELOW

The order below of District Judge H. H. Grooms is reported at 280 F. Supp. 1018 (N. D. Ala. 1968) and is reproduced *infra*, at p. commencing A-1. The opinion below of the Court of Appeals is reported at 430 F. 2d 1093 (5th Cir. 1970) and is reproduced *infra*, at p. commencing A-3.

## JURISDICTION

The Court of Appeals decision below was filed on August 31, 1970. Petitioners' Petition for Rehearing, filed September 12, 1970, was denied below without opinion on September 29, 1970. The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. § 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

1. Does the Court of Appeals decision below impose undue and improper burdens upon the federal judiciary by requiring, in stockholder litigation asserting federally created rights, that the district courts must independently "weigh" the various competing interests and determine on a case-by-case basis whether the attorney-client privilege is available to the corporation against its own stockholders?

2. Does the Court of Appeals decision below establish improper, vague and unworkable standards to be applied by the district courts in determining whether the attorney-client privilege is available to the corporation against its own stockholders, including such "indicia" as the number of shareholders, the percentage of shares owned by plaintiff-stockholders and the extent to which the plaintiff-stockholders are thought to be "blindly fishing," and including the Court of Appeals' statement that the district court:

> "must take full account of the reasons for any asserted privilege, including any especially strong policies of the state in which the court sits. But it must take account of federal interests as well."

3. Does the Court of Appeals decision below erroneously resurrect the requirement of "good cause" for the production of documents (where plaintiff stockholders seek pro-

duction of communications between the corporation's attorney and its officers which occurred prior to institution of suit), notwithstanding the 1970 amendments to the Federal Rules of Civil Procedure (effective prior to the Court of Appeals decision below), which eliminated the requirement of good cause?

4. Does the Court of Appeals decision below erroneously impose upon stockholder-litigants the burden of showing good cause for the production of documents, notwithstanding the 1970 amendments to Rule 26(c), which imposes upon the party from whom production is sought, the burden of showing good cause for any protective order?

5. In stockholder litigation involving both derivative claims brought under the federal securities acts for the benefit of the corporation, and direct claims, for purchaser under the federal securities acts against the corporation and its officers and directors, may the corporation shield its officers (or attorneys) by asserting the attorney-client privilege against its own stockholders with regard to communications between the corporation's management and the corporation's attorney which occurred prior to the institution of the litigation?

6. Is the attorney-client privilege available to a corporation, notwithstanding the fact that it is not a natural person?

## RELEVANT STATUTES AND RULES

Rule 26(b)(1) of the Federal Rules of Civil Procedure (as recently amended) is reproduced *infra* at p. A-23.

Rule 26(c) of the Federal Rules of Civil Procedure is reproduced *infra* at p. A-24.

Rule 34 of the Federal Rules of Civil Procedure, as it existed prior to recent amendments, is reproduced at *infra* at p. A-24.

Rule 43(a) of the Federal Rules of Civil Procedure is reproduced *infra* at p. A-25.

Section 46 of the Alabama Business Corporation Act is reproduced *infra* at p. A-26.

Section 438, Title 7, Code of Alabama of 1940 is reproduced *infra* at p. A-27.

Title 1, § 3, Code of Alabama (1940) is reproduced *infra* at p. A-27.

## STATEMENT OF THE CASE

Petitioners (plaintiffs below) purchased and now hold stock of First American Life Insurance Company (hereinafter "First American"). In their complaint below, petitioners sought refund of the purchase price paid by them for their First American stock or damages, and also sought a money judgment for the benefit of First American.

The amended complaint alleged: (1) that First American securities were not registered with the S. E. C. as required by the Securities Act of 1933, prior to being offered and sold; (2) that the securities issued by First American were offered and sold in violation of the registration and antifraud provisions of the Securities Act of 1933, Securities Exchange Act of 1934, S. E. C. Rule 10b-5, Investment Company Act of 1940, and the Alabama Securities Act; and (3) that the defendants participated in the violations and in a conspiracy to violate the federal and state laws.

In pretrial discovery proceedings, the District Court treated plaintiff's *subpoena duces tecum* as a motion to produce and ordered production by First American of certain documents. First American refused, however, to produce some of the documents ordered produced, on the ground that the documents withheld were privileged communications with its attorneys. It also asserted the attorney-client privilege as a basis for the refusal of R. Richard Schweitzer, its President and former attorney to testify on pretrial deposition concerning certain communications between him (when acting as First American's attorney) and First American officers and directors.

Schweitzer's name and the name of his law firm had appeared in certain First American prospectuses, alleged to be misleading and deceptive, which were used in selling First American stock to plaintiffs. The prospectuses rep-

resented that the law firm had passed upon "the legality of the issue of common stock, as well as certain other legal matters." At the time of his deposition, Schweitzer was temporarily acting as President of First American. All communications sought by plaintiffs occurred prior to the institution of the present action, and all occurred prior to Schweitzer's becoming President of First American. All communications sought occurred during the allegedly illegal offering, some at times when the prospectuses bearing Schweitzer's name and the name of his law firm, were being used to sell stock.

The plaintiffs moved for an order requiring production of the written communications which had been withheld and requiring answers by Schweitzer to questions concerning his written and oral communications with First American's officers during the stock offering. Plaintiff's verified motion asserted on information and belief that the evidence sought was relevant to petitioners' action.[1] This was **not** controverted by First American. First American did **not** question the good faith of plaintiffs in seeking the information, or assert any question of trade secrets or the like.

The pretrial deposition of W. Stacy Branum, former president of First American, and exhibits to his deposition from business records of First American and an affiliated corporation, confirmed the allegations of the complaint

---

[1] Whatever the corporate attorney's answer to the questions propounded, his testimony would clearly be relevant. On the one hand, if the attorney testifies that he did advise defendant officers and directors that the SEC had refused to grant a no action letter, his testimony with regard to that fact would clearly be relevant to the liability of the officers and directors in continuing with the public offering of First American securities. On the other hand, if the attorney testifies that he did **not** advise the officers and directors, and that he did not take steps to prevent further use of the prospectus, then the attorney and his law firm, who were named in the prospectus might themselves be liable.

and amended complaint below; including Petitioners' allegations concerning payoffs to state officials with regard to First American's stock offering and Petitioners' allegations concerning misrepresentations with respect to First American's financial condition. Four witnesses, including another former officer of First American, had in pretrial depositions in this action refused to answer Petitioners' questions and had with respect to those questions asserted witnesses' constitutional privilege against self-incrimination. Each of those depositions was on file with the district court at the time of the district court's order below, and each of those pretrial depositions was part of the record of the court of appeals below. Thus it was a matter of record at the time of the district court order below that Petitioners (plaintiff-stockholders below) had encountered obstacles in ascertaining facts relevant to their complaint, and it was a matter of record at the time of the district court order below (based upon Branum's testimony and exhibits thereto) that there was at least probable cause for Petitioners' allegations of misconduct, misrepresentations and omission to disclose material facts.

Plaintiffs took the position in the courts below that First American's attorneys had been paid to act as attorneys for all First American stockholders, and that Schweitzer and his law firm had undertaken to act as attorneys for the benefit of all investors who might see and rely on First American's prospectuses.[2] Plaintiffs con-

---

[2] See Bittker, "Professional Service Organizations: A Critique of the Literature, 23 Tax Law Review 429 at 430, fn. 1 (May, 1968):

> "Query: Who is the 'client' when a professional opinion is rendered in a . . . public offering of stock, et cetera? If the 'client' includes all those relying on such an opinion how are such limitations on liability to be 'made apparent' to them?"

Accord, **Fischer v. Kletz**, 266 F. Supp. 180 (S. D. N. Y. 1967), quoting with approval the following language from **In the Mat-**

tended that First American should not be permitted to shield its officers (or its attorneys),[3] withhold material facts from the court and from its own stockholders, or assert the attorney-client privilege against its own stockholders. Petitioners contended in the court below that the attorney should not be permitted to prefer one client over another, withholding facts from some of the persons for whom he and his law firm had undertaken to act as attorneys.

On hearing in the district court below, District Judge H. H. Grooms held that "the privilege here claimed is not available as against the plaintiff stockholders," citing English precedents and Section 3 of Title 1 of the Code of Alabama of 1940, which adopts the common law.

First American then took an interlocutory appeal pursuant to 28 U. S. C. § 1292(b) to the Court of Appeals for the Fifth Circuit. The Court of Appeals reversed the district court's ruling, remanded the case for an evidentiary hearing on the question (but failed in its opinion to set out adequate guidelines), and taxed costs of the appeal against the stockholders (Petitioners in this Court). The Court of Appeals held that the corporation had no absolute right to claim the privilege against its own stockholders (thereby disagreeing with the contention advanced by the American Bar Association in an *amicus curiae* brief), but held that the stockholders had to establish good cause for the production of communications between the corporation and its attorneys, and remanded, holding that in stockholder litigation arising under the Federal Securities Acts, the district court must examine the facts and circumstances

---

ter of Touche, Niven, Bailey & Smart, 37 S. E. C. 629 at 670-71 (1957):

> "[The accountant who certifies a financial statement owes a responsibility] not only to the client who pays his fee, but also to investors, creditors and others who may rely on the financial statements which he certifies."

[3] See footnote 1, *supra*.

of each case individually, giving some undefined weight to the state law creating the privilege and such factors as the number of shares owned by the plaintiffs, and whether the plaintiffs appear to be engaged upon a "fishing expedition." The Court of Appeals noted in its opinion that communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged, and noted that communications between an attorney and two or more parties having a common interest are not privileged in an action brought by one against the other. The Court of Appeals below erroneously stated that petitioners had made no claim that a corporation could never assert the attorney-client privilege.

## REASONS FOR GRANTING THE WRIT

Petitioners respectfully submit that this Court should grant certiorari in order to review and revise the decision of the Court of Appeals for the Fifth Circuit. The decisions below are the first in any state or federal court in the United States to consider the question whether the attorney-client privilege may be asserted by a corporation against its own stockholders in litigation brought by stockholders charging the corporation and its officers and directors with acts injurious to their interests as stockholders. The Court of Appeals in its decision below correctly characterized this as an "important question." Petitioners respectfully submit that this question should be decided by this Court because of important implications to the public, investors, the business community, and attorneys who represent corporate clients. Petitioners further submit that the decision below should be reviewed and revised because it creates unnecessary confusion, imposes undue burdens upon the federal district courts and improperly restricts discovery of facts in stockholder actions brought under the federal securities laws.

**I. The Decision Below Should Be Reviewed by This Court Because It Imposes Undue Burdens on the Federal Courts by Requiring District Courts to Hold Evidentiary Hearings in Stockholder Litigation Under the Federal Securities Acts to Determine on a Case-by-Case Basis Whether the Attorney-Client Privilege Is Available to the Corporation Against Its Own Stockholders; It Improperly Requires a Showing of "Good Cause" by Stockholders to Overcome the Privilege; and Requires District Courts to "Balance" the Public Interests Involved in Case-by-Case Decisions, and to Give Some Undefined Weight to State Law in Determining Whether the Privilege May Be Asserted by the Corporation Against Its Stockholders.**

The Court of Appeals asserts in its opinion below that "the attorney-client privilege still has viability for the corporate client" but would permit "stockholders to show cause why it should not be invoked in the particular instance." The opinion appears to require trial courts to "balance the interests" in each case with respect to all the facts and circumstances in determining when the attorney-client privilege shall be available to the corporation. The decision below, if allowed to stand, will impose an awesome burden on the district courts in the following respects:

A. This action arises under federal statutes, rather than state law. The Court of Appeals held below that the district court was to apply federal rather than state law in determining whether the privilege could be asserted. The Court of Appeals then somewhat inconsistently stated: "This is not to say that state interests play no part." The opinion below suggested that the question whether the attorney-client privilege was available to First American was to be decided by the district court "only after consideration of state and federal interests that are inseparable from the factors bearing on the availability of the privilege

itself." That test, if it be a test, is one which district courts cannot apply with certainty because it requires the district court to "consider" state law in reaching its decision, but fails to set forth guidelines and fails to specify the weight, if any, to be given state law.

B. The opinion of the Court of Appeals fails to establish any judicial standards to be applied by trial courts in deciding, in shareholder litigation under the Federal Securities Acts, when and under what circumstances a corporation may assert the attorney-client privilege as to communications between itself and its attorney. The Court of Appeals held that an evidentiary hearing must be held by the trial court, and its opinion sets forth a number of "factors"—including the number of shares of stock held by plaintiffs—which the trial court should "weigh" in reaching its decision as to whether to allow the claim of privilege. It is submitted that the uncertainty of the standards to be applied will result in further delays and appeals in the action below and will encourage further litigation and delays in other stockholder actions in the federal courts, and that the necessity for evidentiary hearings by the trial courts constitutes a heavy and wholly unnecessary burden on trial courts already heavily burdened.

C. The suggestion by the Court of Appeals that trial courts can freely use *in camera* inspection of disputed documents and other evidence fails to take into account the fact that the district judge in stockholder cases is not familiar with and cannot be expected to be familiar with all the corporate records and may well overlook the relevance of a document innocent on its face but of great significance to one with knowledge of other corporate records. *In camera* inspection by a trial court could be useful in suits between stockholders and their corporation and its officers and directors only if the trial court were intimately familiar with all the corporate records and documents. It follows that *in camera* inspection cannot be useful in a

suit of this nature, for it would impose impossible burdens upon the trial court.

D. The opinion below takes the position that the availability of the attorney-client privilege is subject to the right of stockholders to show cause why it should not be invoked in the particular instance, thereby imposing on stockholders the burden of proving special facts and circumstances which would entitle them to disclosure of communications asserted to be privileged. The decision below flies in the face of recent amendments to Rule 34 which eliminates the requirement of good cause.[4] This requirement imposes a burden on the trial court as well, for it must hold an evidentiary hearing to determine whether stockholders have shown cause sufficient to overcome the privilege asserted by the corporation.

E. The standards created by the decision below, and the reference to "fishing expeditions" are inconsistent with the liberal discovery provisions of the Federal Rules and this Court's holdings. As this Court stated in the landmark decision of **Hickman v. Taylor**, 329 U. S. 495 at 507 (1947):

> "We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either

---

[4] As noted in the Advisory Committee's Explanatory Statement concerning Amendments of the Discovery Rules, 48 F. R. D. 487 at 526:

> "Rule 34 is revised . . . (1) to eliminate the requirement of good cause. . . ."
>
> ". . . Good cause is eliminated because it has furnished an uncertain and erratic protection to the parties from whom production is sought. . . ."

party may compel the other to disgorge whatever facts he has in his possession."

F. Rule 26(c) of the Federal Rules of Civil Procedure provides that the burden of showing good cause for a protective order is on the party from whom discovery is sought, rather than on the party seeking discovery. That rule permits appropriate safeguards for a corporation from which disclosure is sought by its stockholders when "trade secrets" are sought or when the corporation can demonstrate that the information is sought for an improper purpose. The Court of Appeals below erred in reversing the district court and in imposing the burden of showing good cause upon the stockholders seeking discovery notwithstanding Rule 26(c), notwithstanding the Court of Appeals ruling below that the attorney-client privilege was not absolute, and notwithstanding the fact that First American had not contended or demonstrated in the district court below that there was any basis for a protective order other than First American's claim that it had an absolute right to assert the attorney-client privilege against its own stockholders.[5]

G. The district courts will stagger under the weight of the decision of the Court of Appeals in this case. The Court of Appeals below has improperly required the district courts, on a case-by-case basis, to "balance the interests" between fostering the attorney-client privilege, on the one hand, and the benefits to be gained from permitting the courts and stockholder-litigants access to all the facts, on the other. The Court of Appeals has failed to provide adequate standards to guide district courts in making such determinations. If the trial courts are to dispose of litiga-

[5] In petitioners' brief below, it was pointed out that the trial court's order requiring production of documents withheld had necessarily involved a finding of "good cause" then required by Rule 34, since the trial court had treated the *subpoena duces tecum* as a motion for production.

tion efficiently and in due course, they must be given definite judicial standards whereby to decide whether, when and under what circumstances such a privilege might be asserted.

The proposed Rules of Evidence for the United States District Courts and Magistrates, published March 12, 1969, 46 F. R. D. 161, would recognize a privilege for corporations as against third persons but do not deal with or establish standards for determining whether the privilege may be asserted by the corporation against its own stockholders. There are exceptions for "joint clients" and for communications in aid of crimes or fraud.

**II. The Decisions Below Present the Novel Question, Never Before Decided by an American Court, Whether a Corporation May Invoke Against Its Own Stockholders the Attorney-Client Privilege as to Communications Between the Corporation's Management and Its Attorney.**

The question whether a corporation may assert the attorney-client privilege against its own stockholders was apparently never raised and resolved in a reported decision in any state or federal court in the United States prior to decision by Judge H. H. Grooms of the United States District Court for the Northern District of Alabama in the instant case. Judge Grooms held that a corporation could not assert the attorney-client privilege against its own stockholders, relying upon the two English cases discussed immediately hereinbelow.

In **Gouraud v. Edison Gower Bell Telephone Company of Europe, Limited,** 57 L. T. Ch. 498, 59 L. T. 813 (1888), the court held that a corporation has no privilege to refuse to reveal to its shareholders communications between the corporation and its legal counsel with regard to the management and administration of the corporation, because the directors, when obtaining legal advice, were acting on be-

half of the company as a whole. The English court reasoned that the relationship between the directors, management, and controlling stockholders of a corporation, on the one hand, and minority stockholders of the corporation, on the other, is analogous to the relationship between a trustee and his beneficiaries[6] in which no attorney-client privilege can be asserted by the trustee against the beneficiaries,[7] or is analogous to the relationship between two partners or clients who jointly hire a common attorney,[8] neither of whom may assert the privilege against the other.[9]

In **Dennis & Sons, Ltd. v. West Norfolk Farmers Manure & Chemical Company, Ltd.**, 2 All E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 TLR 298, 89 Sol. Jo. 211 (1943), the court held that a corporation could not assert an accountant-client privilege against its shareholders, relying on the **Gourand** case.

The decision of Judge Grooms in this action has been expressly approved and followed by other District Courts. See **Fischer v. Wolfinbarger**, 45 F. R. D. 510 (W. D. Ky. 1968); **Dahlke v. Morrison**, CCH Fed. Sec. L. Rep. ¶ 92,490 (N. D. Ala., Oct. 3, 1969); **Fischer v. Wolfinbarger**, C. A. Nos. 5911 and 5919 (M. D. Tenn., Aug. 29, 1969); **Hogan**

---

[6] Accord. **Twin-Lick Oil Co. v. Marbury**, 91 U. S. 587, 588 (1876); **Southern P. Co. v. Bogert**, 250 U. S. 483, 492 (1919); **Jackson v. Ludeling**, 21 Wall. 616, 624 (1874); **Taylor v. Standard Gas & Elec. Co.**, 306 U. S. 307 (1939); **Pepper v. Litton**, 308 U. S. 295 (1939).

[7] **Talbott v. Marshfield**, 2 Dr. & Sm. 549 (1865); Scott, Law of Trusts (2d ed.), p. 1294.

[8] See **Baltimore & Pot. R. Co. v. Fifth Baptist Church**, 108 U. S. 317 (1883): "Private corporations are but associations of individuals united for some common purpose and permitted by law to use a common name, and to change its members without a dissolution of the association."

[9] **Parish v. Gates**, 29 Ala. 254 (1856); **Grand Trunk Western R. Co. v. H. W. Nelson Co.**, 116 F. 2d 823 (6th Cir. 1941).

**v. Teledyne, Inc.**, C. A. 69-C 1941 (N. D. Ill. Order of Chief Judge Robinson requiring answer by Teschke, April 22, 1970); **Epstein v. Weiss**, C. A. 67-233 (E. D. La., N. O. Div., May 13, 1970).[10] No decision to the contrary (except for the decision below of the Court of Appeals) has been discovered.

Although never raised in the United States prior to the instant cases, the novel question presented is an important one, as evidenced by the fact that the American Bar Association and its Section of Corporation, Business and Banking Law filed a lengthy *amicus* brief and argued orally for permitting the privilege to be asserted by First American against its own stockholders. In its *amicus* brief, the American Bar and its Section of Corporation, Business and Banking Law argued that the attorney-client privilege promotes "freedom of consultation" with attorneys and that compulsory disclosure of communications between attorneys and their corporate clients would as a practical matter inhibit consultation with attorneys. The American Bar Association argued that a corporation is a distinct entity, to be considered as separate and apart from the individuals who own its stock, and that the attorney-client privilege should be absolute as to all communications between the corporation and its attorney, even those involving future corporate actions which might be criminal.

Petitioners insisted in the courts below that there should be no right to withhold from stockholders communications from or to the corporation's attorney, in an action brought by stockholders against the corporation and its management.

The questions raised by the decision below are important and will recur time and again. Recent years have

---

[10] See also **Patti Lea, Inc. v. District Court**, 423 P. 2d 27 (Supreme Ct. of Colo. *en banc* 1967), in which a corporation was held not to have the right to assert a statutory accountant-client privilege against its own stockholder.

seen increasing resort to the federal courts and to the protections afforded the public and investors by the Federal Securities Acts. The problem may arise in other contexts. The corporate attorney's testimony concerning his advice to management with regard to the federal antitrust laws may be critically important in stockholder litigation seeking indemnification from corporate officers and employees for civil and criminal penalties imposed on the corporation. The corporation's right to indemnification was recently recognized in **Wilshire Oil Co. v. Riffe**, 409 F. 2d 1277 (10th Cir. 1969), **noted**, 83 Harv. L. Rev. 943 (1970).

There is a compelling need for clarification by this Court concerning the corporate attorney's duty and relationship to stockholders, the duty and relationship of attorneys whose names appear in prospectuses to investors who rely on those prospectuses, and whether a corporation may shield its officers (or attorneys) by concealing and withholding from its stockholders communications between the corporation's officers and its attorneys. These questions are of pervasive importance to all investors, the corporations in which they invest, and the attorneys who represent corporate clients.

## III. This Court Should Grant Certiorari to Decide the Important Question Whether a Corporation, Which Is Not a Natural Person, May Assert the Attorney-Client Privilege.

The Court of Appeals opinion below erroneously states that "there is no contention by plaintiffs that FAL [First American] is outside the ambit of the attorney-client privilege because a corporation is not a client." Pages 28-29 of plaintiff's Reply Brief filed with the Court of Appeals on December 6, 1968, argued that a corporation could not assert the privilege, because it was not a natural person.

The question whether the attorney-client privilege is available to a corporation was recently raised from the bench by Mr. Justice White in oral argument on December 16, 1970 in **Decker v. Harper & Row Publishers, Inc.**, Case No. 113, 1970 Term. That question had apparently never before been argued on the merits before this Court. The Government apparently conceded, in **United States v. Louisville & Nashville R. R.**, 236 U. S. 318 (1915), that the attorney-client privilege may be asserted by a corporation.[11]

In **Radiant Burners, Inc. v. American Gas Association**, 207 F. Supp. 771 (N. D. Ill. 1962), **reversed**, 320 F. 2d 314 (7th Cir. 1963), **cert. denied**, 375 U. S. 929 (1963), the district court held that the attorney-client privilege may be asserted only by natural persons. The district court reasoned that the attorney-client privilege was an exception to the general rule favoring full disclosure of the truth, and that the only justification or *raison d'etre* for the privilege was to assure accused individuals of a fair trial. The Court of Appeals for the Seventh Circuit reversed, holding that "history, principle, precedent and public policy" support the extension of the attorney-client privilege to corporations. The Seventh Circuit held, however, that because the attorney-client privilege is an exception to the general duty of disclosure, the privilege should be "strictly confined within the narrowest possible limits consistent with the logic of its principle." This Court then denied certiorari, but the denial of certiorari imports no expression of opinion by this Court upon the merits of a decision below. **Daniels v. Allen**, 344 U. S. 443 (1953).

More recently, this Court held in **George Campbell Printing Corp. v. Reid**, 392 U. S. 286 (1968), that the

---

[11] The proposed Rules of Evidence for the United States District Courts and Magistrates, 46 F. R. D. 161, would create a federal attorney-client privilege for corporations. We respectfully submit that the proposed Rules should be altered in this respect.

privilege against self-incrimination is "essentially a personal one, applying only to natural individuals" and is not available to a corporation. If a corporation, which may be convicted of a crime, is not entitled to the privilege against self-incrimination, we respectfully submit that there is no sound basis for affording it an attorney-client privilege.

In view of the **Campbell** decision, we think that a review of the decision by the Court of Appeals in the instant case is imperative. The question recently posed by Mr. Justice White concerning whether a corporation may invoke the attorney-client privilege is of great importance. This Court should decide that question.

**IV. This Court Should Grant Certiorari Because One of the Issues Raised Herein Would Be Dispositive of Decker v. Harper & Row Publishers, Inc., No. 112, 1970 Term, Now Under Submission in This Court.**

Petitioners respectfully submit that certiorari should be granted because one of the issues presented herein would be dispositive in **Decker v. Harper & Row Publishers, Inc.**, 1970 Term, orally argued December 16, 1970 and now under submission in this Court.

The question presented to this Court for ruling in **Decker** is whether a corporation's attorney-client privilege extends to narrative statements solicited by corporate counsel from non-management employees concerning their prior testimony before a grand jury.

In the course of oral argument in **Decker** on December 16, 1970, Mr. Justice White from the bench raised the question whether a corporation, which is not a natural person, may ever assert the attorney-client privilege. That question was not the principal thrust of petitioners' posi-

tion in **Decker**, although raised by the parties and probed by the Court in oral argument. The question is presented in the present petition and, if answered in the negative, would be dispositive in **Decker**. A decision by this Court that a corporation may not assert the privilege would eliminate the necessity for consideration by this Court and the lower courts of such "nice" and time-consuming questions as whether particular employees are "management" or "non-management employees," and whether, after "weighing" all factors involved, stockholder-plaintiffs have shown "good cause" for production of correspondence with their corporation's attorney, whose attorney fees were paid with stockholders' money.

## CONCLUSION

For the reasons stated hereinabove, we respectfully submit that this Court should grant Certiorari to review the August 31, 1970, decision of the Court of Appeals for the Fifth Circuit.

J. VERNON PATRICK, JR.
1400 City National Bank Building
Birmingham, Alabama 35203

MARVIN CHERNER
516 Brown-Marx Building
Birmingham, Alabama 35203
Attorneys for Petitioners

Of Counsel
CHERVIS ISOM
HOWARD WALTHALL
BERKOWITZ, LEFKOVITS & PATRICK
1400 City National Bank Building
Birmingham, Alabama 35203

In the United States District Court for the
Northern District of Alabama
Southern Division

A. L. Garner, et. al.,
Plaintiffs,
vs.
Rick Wolfinbarger, et. al.,
Defendants.
Civil Action
No. 67-564

## ORDER OF AMENDMENT

For good cause shown, the Court's order of February 20, 1968, on plaintiffs' motion to require First American Life Insurance Company to comply with this Court's order dated November 8, 1967, and upon plaintiffs' motion to require R. R. Schweitzer to answer oral interrogatories propounded on deposition, be and the same hereby is amended as indicated herein.

This matter came on for hearing on February 19, 1968, upon plaintiffs' motion to require First American Life Insurance Company, a corporation, and its president R. Richard Schweitzer, to comply with this Court's order of November 8, 1967, respecting the production of certain documents, and also upon plaintiff's motion filed herein on February 19, 1968, to require said Schweitzer to answer oral interrogatories propounded on deposition. Schweitzer is an attorney at law, and became president of First American Life Insurance Company shortly after the filing of this suit.[1]

The point at issue on the motions is whether communications, prior to filing of this suit, between Schweitzer or

[1] It was revealed in oral argument that he has recently resigned.

other attorneys for First American Life Insurance Company and First American Life Insurance Company are privileged as to the complaining stockholders of First American, which stockholders are charging the corporation and its officers with wrongful acts injurious to their interests as stockholders. The Court has heard oral argument on the issue and has reviewed the memorandum briefs filed.

Research of counsel has produced only two cases in which the issue has been directly decided. Both of these are English cases. **Gouraud v. Edison Gower Bell Telephone Company of Europe Limited**, 57 L. T. Ch. 498, 59 L. T. 813; and **W. Dennis and Sons, Ltd. v. West Norfolk Farmers' Manure and Chemical Company, Ltd.**, 2 A11 E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 T. L. R. 298, 87 Sol. Jo. 211. The first case was decided in 1888, and the latter in 1943. In each of these cases the courts held that the privilege did not exist.

Section 3 of Title 1 of the Alabama Code provides as follows:

> "The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature."

The Court is of the opinion that the provilege here claimed is not available as against plaintiff stockholders.

Accordingly, the motions will be and each of the same is hereby granted.

So Ordered, this the 21st day of February, 1968.

H. H. Grooms
United States District Judge

**Opinion of August 31, 1970 of Court of Appeals Below:**

In the
United States Court of Appeals
For the Fifth Circuit

---

No. 26168

---

A. L. Garner, et al.,

Appellants,

versus

Rick Wolfinbarger, et al.,

Appellees.

---

Ex Parte A. L. Garner, et al.,

Petitioners,

versus

Hon. H. H. Grooms, U. S. District Judge for the Northern District of Alabama, Rick Wolfinbarger, et al.,

Respondents.

---

Consolidated With
No. 26266

---

First American Life Insurance Company,

Appellants,

versus

A. L. Garner, et al.,

Appellees.

---

**Appeals from the United States District Court for the Northern District of Alabama**

---

**Petition for Writ of Mandamus**
**Northern District of Alabama**

---

**(August 31, 1970)**

---

**Before Brown, Chief Judge; Godbold, Circuit Judge; and Cabot, District Judge**

Godbold, Circuit Judge: This case presents the important question of the availability to a corporation of the privilege against disclosure of communications between it and its attorney, when access to the communications is sought by stockholders of the corporation in litigation brought by them against the corporation charging the corporation and its officers with acts injurious to their interests as stockholders. Also we are asked to review the correctness of an order of the District Court transferring the case to another district.

The District Court, in an order reported at 280 F. Supp. 1018 (N. D. Ala. 1968), held the privilege was not available as against the stockholders as plaintiffs. Subsequently its ruling has been followed in **Dahlke v. Morrison**, No. 69-497, N. D. Ala., Oct. 3, 1969; **Fischer v. Wolfinbarger**, Nos. 5911 and 5919, M. D. Tenn., Aug. 29. 1969; and **Fischer v. Wolfinbarger**, 45 F. R. D. 510 (W. D. Ky., 1968).[1]

---

[1] Comment, **The Attorney-Client Privilege in Shareholders' Suits**, 69 Colum. L. Rev. 309 (1969), criticizes the decision below and cases which have followed it.

Stockholders of First American Life Insurance Company of Alabama (FAL) brought, in the Northern District of Alabama, a class action alleging violations of the Securities Act of 1933,[2] the Securities Exchange Act of 1934,[3] SEC Rule 10(b)(5),[4] the Investment Company Act of 1940,[5] the Alabama Securities Act[6] and common law fraud, seeking to recover the purchase price which they and others similarly situated paid for their stock in FAL. The defendants are FAL and various of its directors, officers and controlling persons. The plaintiffs also claim that FAL was itself damaged by alleged fraud in the purchase and sale of securities, and, on behalf of FAL, they assert against various individual defendants a derivative action on behalf of the corporation.

FAL filed a cross-claim against all other defendants, asserting in its own behalf the rights the plaintiff shareholders had claimed in the derivative aspect of their complaint.

R. Richard Schweitzer served as attorney for the corporation in connection with the issuance of the FAL stock here involved. After the transactions sued upon were complete he became its president. On deposition Schweitzer was asked numerous questions concerning advice given by him to the corporation about various aspects of the issuance and sale of the stock and related matters. Other questions went into the content of discussions at meetings attended by him and company officials and information furnished to him by the corporation.

---

[2] 15 U. S. C., §§ 77a-77aa.

[3] 15 U. S. C., §§ 78a-78hh-1.

[4] 17 C. F. R., § 240.10b-5.

[5] 15 U. S. C., §§ 80a-1–80a-52.

[6] Tit. 53, §§ 28-65, Code of Ala. (1969 Supp.).

All questions related to times at which Schweitzer acted solely as attorney, before he became an officer of the company and before the filing of suit. Objections were made by counsel for the corporation and by Schweitzer himself that the attorney-client privilege barred his revealing both communications to him by the corporation and the advice which he gave to the corporation.[7]

The plaintiffs had served a subpoena duces tecum on Schweitzer to bring various documents to the taking of his deposition. Both he and the corporation claimed the privilege with respect to some of the documents. The District Court treated the subpoena as though it were a motion to produce under Rule 34.

The District Judge held that the privilege is not available to the corporation as against these plaintiff stockholders.

Contemporaneously the District Judge ordered the case transferred to the Southern District of Alabama under 28 U. S. C., § 1404(a).[8] With respect to both orders he entered appropriate findings pursuant to 28 U. S. C., § 1292 (b), the interlocutory appeal statute.[9]

---

[7] The objection is the client's to invoke, not the attorney's. Since FAL counsel objected we need not inquire into the effectiveness of Schweitzer's objection. The parties make no distinction between the client's communications to the attorney and the attorney's communications to the client, and it is not necessary that we do so. See, *e. g.*, 8 in 1 Pet Products, Inc. v. Swift & Co., 218 F. Supp. 253 (S. D. N. Y. 1963); 8 Wigmore, Evidence, § 2320 at 628 (McNaughton rev. 1961).

[8] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[9] "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially ad-

This court granted applications to allow both interlocutory appeals—the plaintiffs from the transfer order, docketed as No. 26168, and the defendants from the order denying the claim of privilege, docketed as No. 26266—but provided that ultimate disposition of the appropriateness of interlocutory appeal would be taken with the case on the merits. Also the plaintiffs filed with this court a petition for a writ of mandamus directing the District Judge to retain jurisdiction of the case in the Northern District. The two interlocutory appeals were consolidated and the petition for mandamus carried with the consolidated case for decision.

The court has concluded that the consolidation of the two interlocutory appeals should be vacated. In this opinion we decide No. 26266, the interlocutory appeal of FAL, on the privilege issue. No. 26168, the interlocutory appeal on the transfer issue, shall be a separate proceeding, and the petition for writ of mandamus is carried with it for decision. A separate opinion shall be rendered therein by the same panel of the court and a separate judgment and mandate entered.

## A. Appealability

The appeal from the order denying the attorney-client privilege to the corporation is proper under § 1292(b). It satisfies each of the three requirements of that subsection. The availability *vel non* of the privilege of the corporation as against its stockholders is a "controlling question of law" as opposed to a question of fact or matter for the discretion of the trial court. See **Continental**

---

vance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order . . ."

**Grain Co. v. Federal Barge Lines, Inc.**, 268 F. 2d 240 (5th Cir. 1959), *aff'd sub nom.* **Continental Grain Co. v. Barge FBL-585**, 364 U. S. 19, 4 L. Ed. 2d 1540 (1960). As will appear from our discussion, there is "substantial ground for difference of opinion." The appeal "may materially advance the ultimate termination of the litigation." Several individual defendants have invoked their privilege against self-incrimination. The availability or unavailability of the testimony and documents sought may affect the disposition of the pending motions to dismiss. Review under § 1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal. **Atlantic City Electric Co. v. General Electric Co.**, 207 F. Supp. 613 (S. D. N. Y.), *aff'd* 312 F. 2d 236 (2d Cir. 1962), *cert. denied* 373 U. S. 909, 10 L. Ed. 2d 411 (1963) (statute of limitations at issue in a private anti-trust action).

B. Background and choice of law

Turning to the merits, there is no contention by plaintiffs that FAL is outside the ambit of the attorney-client privilege because a corporation is not a client.[10] Their argument is that the privilege is not available to FAL in the circumstances of this case against the demands of the corporate stockholders for access to the communications. The corporation says that its right to assert the privilege is absolute and of special importance where disclosure is

[10] Numerous cases sustain the proposition that a corporation is a client for the purpose of invoking the privilege. *E. g.*, United States v. Louisville & N. R. R., 236 U. S. 318, 59 L. Ed. 598 (1915); Schwimmer v. United States, 232 F. 2d 855 (8th Cir.), *cert. denied*, 352 U. S. 833, 1 L. Ed. 2d 52 (1956); Belanger v. Alton Box Board Co., 180 F. 2d 87 (7th Cir. 1950). A decision to the contrary, Radiant Burners, Inc. v. American Gas Ass'n, 207 F. Supp. 771 (N. D. Ill. 1962), was reversed by the Seventh Circuit, 320 F. 2d 314 (7th Cir.), *cert. denied*, 375 U. S. 929, 11 L. Ed. 2d 262 (1963).

sought in a suit brought by the shareholders against the corporation. The American Bar Association appears as amicus curiae and supports the view of an absolute privilege.

The privilege does not arise from the position of the corporation as a party but its status as a client. However, in this instance plaintiffs deny the availability to the corporation of the otherwise existent privilege because of the role of the corporation as a party defending against claims of its stockholders.[11]

We do not consider the privilege to be so inflexibly absolute as contended by the corporation, nor to be so totally unavailable against the stockholders as thought by the District Court. We conclude that the correct rule is between these two extreme positions.

The availability *vel non* of the privilege involves a complex problem of choice of law. 2B Barron & Holtzoff, Federal Practice & Procedure, § 967 at 241-44 (Wright ed. 1961). The order of the District Court appears to treat Alabama standards as controlling. We conclude that the choice of law cannot be settled by reference to any simple talisman, but can be arrived at only after a consideration of state and federal interests that are inseparable from the factors bearing on the availability of the privilege itself.

Our starting point is Rule 43(a), Fed. R. Civ. P.:

> All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity,

---

[11] The District Court has not ruled on motions to dismiss the derivative claim. But our decision does not turn on whether that claim is in the case or out.

> or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs. . . .

Since this is a case of first impression at the court of appeals level, neither the law of Alabama nor federal law offers many guideposts. Alabama has codified its common law attorney-client privilege, Tit. 7, § 438, Code of Ala. (1958 Recomp.), and apparently affords it to corporations *cf.* **Nationwide Mut. Ins. Co. v. Smith**, 280 Ala. 152, 194 So. 2d 505 (1966); **Melco System v. Receivers of Trans-America Ins. Co.**, 268 Ala. 152, 105 So. 2d 43 (1958), as does federal decisional law. See fn 10, *supra*. Alabama follows the exceptions discussed *infra* for consultations concerning contemplated crimes, **Ex parte Enzor**, 270 Ala. 254, 117 So. 2d 361 (1960), and fraud, **Sawyer v. Stanley**, 241 Ala. 39, 1 So. 2d 21 (1941), and for communications to a joint attorney, as between joint clients, **Nationwide Mut. Ins. Co. v. Smith**, *supra*. There is no comprehensive federal body of law surrounding the attorney-client privilege,[12] and no opinion of the circuit courts of appeals discussing the precise issue at hand. There is then no direct conflict between state and federal rules of privilege and non privilege in this case.

This is a federal question case (with ancillary state aspects) rather than a diversity case. Such actions are predicated on federal law, embodying federal policies. Enforcement of those policies demands that the federal courts apply their own rules of privilege where substantial

---

[12] Proposed Rules of Evidence for the United States District Courts and Magistrates, published March 1969 by a committee of the Judicial Conference of the United States, would give federal statutory underpinnings to the privilege, with exceptions for *inter alia* furtherance of crime or fraud and joint clients. Proposed Rule 5-03. See 46 F. R. D. 161 at 249-51 (1969).

state interests are not infringed. See Comment, **Evidentiary Privileges in the Federal Courts**, 52 Calif. L. Rev. 640 (1964), 2B Barron & Holtzoff, Federal Practice & Procedure, § 967 at 243-44 (Wright ed. 1961), *cf.* 4 Moore, Federal Practice, ¶ 26.23[9] at 1481-85 (1969).

Several courts have recognized in the context of administrative investigations into federal income tax liability that these policies require separate federal evaluation of the attorney-client privilege. **Colton v. United States**, 306 F. 2d 633 (2d Cir. 1962), **In re Albert Lindley Lee Memorial Hospital**, 209 F. 2d 122 (2d Cir. 1953) (physician-patient privilege); **Falsone v. United States**, 205 F. 2d 734 (5th Cir.), **cert. denied**, 346 U. S. 864, 98 L. Ed. 375 (1953) (accountant-client privilege); **United States v. Kansas City Lutheran Home & Hospital Ass'n**, 297 F. Supp. 239 (W. D. Mo. 1969) (physician-patient privilege); **Dorfman v. Rombs**, 218 F. Supp. 905 (N. D. Ill. 1963) (accountant privilege); **United States v. Summe**, 208 F. Supp. 925 (E. D. Ky. 1962); *contra*, **Baird v. Koerner**, 279 F. 2d 623 (9th Cir. 1960).

Our **Falsone** case and others which rely on it create a separate enclave for tax investigations in that federal courts in enforcing subpoenas,[13] like the investigating agency in issuing them, are not bound by the admissibility standards of Rule 43(a) applicable in trial proceedings. Although in some instances there may be reason to maintain the distinction, **United States v. McKay**, 372 F. 2d 174 (5th Cir. 1967), the need for balancing competing interests in disclosure and nondisclosure is as compelling in federal question case as it is in tax investigations. Rule

---

[13] The courts are empowered to compel testimony or production of relevant documents. 26 U. S. C., §§ 7402(b), 7604(a); Reisman v. Caplin, 375 U. S. 440, 11 L. Ed. 2d 459 (1964). The Federal Rules govern the conduct of the enforcement proceeding. United States v. Powell, 379 U. S. 48 at 58, n. 18, 13 L. Ed. 2d 112 at 119 (1964).

43(a) clearly favors disclosure in trial proceedings. Disclosure in a tax investigation is no less potentially destructive of confidential relationships than in other cases. Disclosure in a whole variety of other federal question cases may be no less important in the interest of seeking the truth than in tax investigations. We find nothing in either Rule 43(a) or the Rules of Decision Act to prevent a federal court from independently weighing the competing interests in any federal question case.

Many federal courts in nondiversity cases have reached the same result by undertaking to determine the common law of privilege with little or no reference to state law. See, *e. g.*, **Natta v. Hogan**, 392 F. 2d 686 (10th Cir. 1968); **Radiant Burners, Inc. v. American Gas Ass'n**, 320 F. 2d 314 (7th Cir.), **cert. denied** 375 U. S. 929, 11 L. Ed. 2d 262 (1963); **United States v. United Shoe Machinery Corp.**, 89 F. Supp. 357 (D. Mass. 1950). Even **Baird v. Koerner**, *supra*, which contains language to the effect that federal courts follow state privilege standards in every case, and is often cited for that proposition, looked to decisions from other states and federal courts to reinforce its conclusion that the privilege was available in that case.[14]

The Sixth Circuit has held that a state privilege which would have excluded a wife's testimony was not controlling in a federal question case. **United States v. Brunner**, 200 F. 2d 276 at 280 n. 2 (6th Cir. 1952). In an earlier case, that court took the approach we suggest here. Faced with a privilege embodied in the common law of both the forum state and other states, in circumstances where exceptions to the privilege developed in other jurisdictions would render the evidence admissible, the court chose not

---

[14] We note the court's language in Baird v. Koerner that the attorney-client privilege "must be assessed on a case to case basis, depending on the particular facts of each case," 270 F. 2d at 631, quoting Wigmore for the proposition that the policy of full disclosure must always be taken into account, *id.* at 631-32.

to confine itself to the undeveloped law of the state in which the district court sat, but drew upon other authorities which might cast light on the policies behind the privilege. **Fraser v. United States**, 145 F. 2d 139 (6th Cir. 1944), **cert. denied**, 324 U. S. 849, 89 L. Ed. 1409 (1945).

Our conclusion is supported by the thrust of recent Fifth Circuit decisions in diversity cases. Twice we have held "outcome-determinative" state rules of evidence not controlling in diversity cases, relying on the federal interest in promoting orderly trial procedure in the courts of the United States. In **Monarch Ins. Co. v. Spach**, 281 F. 2d 401 (5th Cir. 1960), a written statement regarding an accident was held admissible under Rule 43(a) despite failure to furnish a copy on request, which in the Florida courts would have rendered the statement inadmissible. We listed as an important factor in our decision

> the indispensable necessity that a tribunal, if it is to be an independent court administering law, must have the capacity to regulate the manner by which cases are to be tried and facts are to be presented in the search for the truth of the cause.

*Id.* at 407.[15] **Accord, Dallas County v. Commercial Union Assurance Co.**, 286 F. 2d 388 (5th Cir. 1961).

In **Boeing Co. v. Shipman**, 411 F. 2d 365 (5th Cir. 1969), this court en banc held that "in diversity cases federal courts apply a federal rather than a state test for the sufficiency of evidence to create a jury question," *Id.* at 368, saying in addition:

---

[15] **Monarch** noted the split in authority that application of this rule to privilege questions in diversity cases has produced. *Id.* at 408-09, n. 15. For example, Massachusetts Mut. Life Ins. Co. v. Brei, 311 F. 2d 463, 466 (2d Cir. 1962), points out that rules of privilege have substantive as well as procedural importance. Our decision does not in any way reach the issue of the law controlling privilege questions in diversity cases.

> Federal courts must be able to control the fact-finding processes by which the rights of litigants are determined in order to preserve "the essential character" of the federal judicial system. Of course, we do not contend that this control will not affect state-created substantive rights in some cases. Ultimately, however, the integrity of our fact-finding processes must outweigh considerations of uniformity [citing cases].

*Id.* at 369-70. In federal question cases, there is the additional factor that federal substantive rights may be compromised if a stringent state rule of evidence is applied.

This is not to say that state interests play no part. Our discussion below points up that many of the factors to be weighed in the consideration of federal and state interests are predicated on values long embodied in policies of the states rather than federal law.[16] And it goes without saying that a federal court must take full account of the reasons for any asserted privilege, including any especially strong policies of the state in which the court sits. But it must take account of federal interests as well.

The competing interests in disclosure on the one hand and confidentiality on the other neither of which lies exclusively within the state or federal realm, are the subject of the next part of our discussion.

C. The availability of the privilege.

The privilege must be placed in perspective. The beginning point is the fundamental principle that the public has the right to every man's evidence, and exemptions from the general duty to give testimony that one is capable of giving are distinctly exceptional. 8 Wigmore, Evi-

---

[16] For example, the responsibility of officers and directors toward the stockholders of a corporation, which is an important factor in our decision.

dence, § 2192 at 70. An exception is justified if—and only if—policy requires it be recognized when measured against the fundamental responsibility of every person to give testimony. *Id.*, § 2285 at 527. Professor Wigmore describes four conditions, the existence of all of which is prerequisite to the establishment of a privilege of any kind against the disclosure of communications:

> § 2285. **General principle of privileged communications.** Looking back upon the principle of privilege, as an exception to the general liability of every person to give testimony upon all facts inquired of in a court of justice, and keeping in view that preponderance of extrinsic policy which alone can justify the recognition of any such exception (§§ 2192 and 2197 *supra*), four fundamental conditions are recognized as necessary to the establishment of a privilege against the disclosure of communications:
>
> (1) The communications must originate in a **confidence** that they will not be disclosed.
>
> (2) This element of **confidentiality must be essential** to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The **relation** must be one which in the opinion of the community ought to be sedulously **fostered.**
>
> (4) The **injury** that would inure to the relation by the disclosure of the communications must be **greater than the benefit** thereby gained for the correct disposal of litigation.
>
> Only if these four conditions are present should a privilege be recognized.

*Id.*, § 2285 at 527. And he points out that in the case of communications between attorney and client all four conditions are present, with the only condition open to dispute being the fourth. *Id.*, § 2285 at 528.

As to this particular type of privileged communication:

> . . . the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle.

*Id.*, § 2291 at 554.

> The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent. Such is the modern theory.

*Id.*, § 2291 at 545.

The problem before us concerns Wigmore's fourth condition, a balancing of interests between injury resulting from disclosure and the benefit gained in the correct disposal of litigation. We consider it in a particularized context: where the client asserting the privilege is an entity which in the performance of its functions acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications.

It is urged that disclosure is injurious to both the corporation and the attorney. Corporate management must manage. It has the duty to do so and requires the tools to do so. Part of the managerial task is to seek legal counsel when desirable, and, obviously, management prefers that it confer with counsel without the risk of having the communications revealed at the instance of one or

more dissatisfied stockholders. The managerial preference is a rational one, because it is difficult to envision the management of any sizeable corporation pleasing all of its stockholders all of the time, and management desires protection from those who might second-guess or even harass in matters purely of judgment.

But in assessing management assertions of injury to the corporation it must be borne in mind that management does not manage for itself and that the beneficiaries of its action are the stockholders. Conceptualistic phrases describing the corporation as an entity separate from its stockholders are not useful tools of analysis. They serve only to obscure the fact that management has duties which run to the benefit ultimately of the stockholders. For example, it is difficult to rationally defend the assertion of the privilege if all, or substantially all, stockholders desire to inquire into the attorney's communications with corporate representatives who have only nominal ownership interests, or even none at all.[17] There may be reasonable differences over the manner of characterizing in legal terminology the duties of management, and over the extent to which corporate management is less of a fiduciary than the common law trustee. There may be many situations in which the corporate entity or its management, or both, have interests adverse to those of some or all stockholders. But when all is said and done management is not managing for itself.

The representative and the represented have a mutuality of interest in the representative's freely seeking advice

---

[17] Due regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege, sometimes injuriously (though not necessarily so—in some situations shareholders who are not plaintiffs may benefit). The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others constituting a majority.

when needed and putting it to use when received. This is not to say that management does not have allowable judgment in putting advice to use. But management judgment must stand on its merits, not behind an ironclad veil of secrecy which under all circumstances preserves it from being questioned by those for whom it is, at least in part, exercised.

The District Court relied upon two English cases, **Gouraud v. Edison Gower Bell Telephone Co.**, 57 L. T. Ch. 498, 59 L. T. 813 (1888) and **W. Dennis & Sons, Ltd. v. West Norfolk Farmers' Manure & Chem. Co.**, 2 All E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 TLR 298, 87 Sol. Jo. 211 (1943). Both cases treat the relationship between shareholder and company as analogous to that between beneficiaries and trustees, a basis which the defendants in the present case say has no viability for American corporations. Though not binding precedents, these English cases are persuasive recognition that there are obligations, however characterized, that run from corporation to shareholder and must be given recognition in determining the applicability of the privilege.

Apart from the conceptualism that surrounds the management-stockholder relationship, the ABA alternatively contends, implicitly within the framework of Wigmore's fourth condition, that the benefits of disclosure are outweighed by the harm done to both client and attorney. In support of this policy argument, the ABA relies heavily upon **In re Prudence Bonds Corp.**, 76 F. Supp. 643 (E. D. N. Y. 1948), which held that a trustee for bondholders in an action for an accounting brought by the bondholders would not be required to produce opinions of counsel rendered to the trustee over a period of eighteen years. That case in turn distinguished the English cases cited above, speculating that the unavailability of the privilege might ultimately harm both attorneys and bondholders.

The ABA urges that the privilege is most necessary where the corporation has sought advice about a prospective transaction, where counsel in good faith has stated his opinion that it is not lawful, but the corporation has proceeded in total or partial disregard of counsel's advice. The ABA urges that the cause of justice requires that counsel be free to state his opinion as fully and forthrightly as possible without fear of later disclosure to persons who might attack the transaction, and that without the cloak of the privilege counsel may be "required by the threat of future discovery to hedge or soften their opinions."

The ABA brief does not always distinguish clearly between the separate interests of the corporate client and of the attorney in freedom from disclosure, nor is it possible always to do so. The privilege's exemptions from the broad duty to divulge are designed not only to protect the individual client who may assert the privilege but also to promote free and open communication between clients and attorneys in all matters. All these interests should properly be taken into account in any decision on the privilege. However, we reject the idea that the prospective decision of the client on whether to abide by advice or disregard it, or the guarantee of a veil of secrecy, either establishes or narrows the attorney's obligation in the giving of advice. And to grant to corporate management plenary assurance of secrecy for opinions received is to encourage it to disregard with impunity the advice sought.[18]

Two traditional exceptions are also persuasive in negativing any absolute privilege in a corporation in the circumstances of this case. These are the exceptions for

---

[18] We do not consider it determinative whether the attorney consulted is corporated or house counsel, or whether his fees are paid by the corporation or by management on its own account.

communications in contemplation of a crime or fraud, and for communications to a joint attorney.

Communications made by a client to his attorney during or before the commission of a crime or fraud for the purpose of being guided or assisted in its commission are not privileged. **Union Camp Corp. v. Lewis**, 385 F. 2d 143 (4th Cir. 1967); **Pollock v. United States**, 202 F. 2d 281 (5th Cir. 1953); **United States v. Bob**, 106 F. 2d 37 (2d Cir.); **cert. denied**, 308 U. S. 589, 84 L. Ed. 493 (1939).[19] The stockholders claim to have been the victims of improprieties in the issuance and sale of FAL's stock. The questions, and the documents sought, concerned those alleged improprieties, with particular regard to whether the attorney advised the corporation that proposals it had in mind were not legal and that statements to be put in its prospectus were misleading.

The plaintiffs say that some of the matter claimed to be privileged concerned prospective criminal transactions, including issuance by FAL of a misleading prospectus, the circulation of which it is said was a criminal offense under federal securities law, and the granting of options (allegedly as bribes) for securing state registrations of FAL's stock and of its broker-dealer and salesmen. In considering the interplay of interest of management, of stockholders, and of the lawsuit, it must be recognized that management has an obligation to the corporation, to the stockholders and to the public to do what is lawful. But we do not consider unavailability of the privilege to be confined to the narrow ground of prospective criminal transactions. The differences between prospective crime

[19] Dictum in at least one famous case states the exception even more broadly, extending it to communications with a lawyer in furtherance of "the purpose of committing a crime or tort." United States v. United Shoe Machinery Corp., 89 F. Supp. 357, 358 (D. Mass. 1950).

and prospective action of questionable legality, or prospective fraud, are differences of degree, not of principle.[20]

A second exception is also instructive. In many situations in which the same attorney acts for two or more parties having a common interest, neither party may exercise the privilege in a subsequent controversy with the other. This is true even where the attorney acts jointly for two or more persons having no formalized business arrangement between them. 8 Wigmore, § 2312 at 603; **Grand Trunk W. R. R. v. H. W. Nelson Co.**, 116 F. 2d 823, 835 (6th Cir. 1941). The exception applies to partners, **Billias v. Panageotou**, 193 Wash. 523, 76 P. 2d 987 (1938); makers of mutual wills, **Wilson v. Gordon**, 73 S. C. 155, 53 S. E. 79 (1905), and joint trustors. **Boyle v. Kempkin**, 243 Wis. 86, 93, 9 N. W. 2d 589 (1943); insured and insurer in an automobile death action, **Hoffman v. Labutzke**, 233 Wis. 365, 377, 289 N. W. 652, 657 (1940); and many others.

In **Pattie Lea, Inc. v. District Court**, 423 P. 2d 27 (Colo. 1967) (en banc), a case strikingly similar to this one, the Supreme Court of Colorado held that the statutory privilege for communications between a certified public accountant and his corporate client did not protect the corporation from being required to disclose to its own stockholders in a good faith derivative suit brought by them against the corporation communications from the corporation to the CPA. The Colorado court relied upon the

---

[20] The crime-fraud exception is particularly instructive because it covers advice concerning prospective action. We recognize the much stronger policy justifications behind the confidentiality of communications with one who is already a wrongdoer and seeks legal advice appropriate to his plight as opposed to one who seeks advice concerning proposed future conduct and, having later acted, seeks to maintain the secrecy. See 8 Wigmore, § 2298 at 573. FAL does not recognize the unavailability of the privilege even as to communications about transactions wholly prospective (except, possibly, where relating to commission of a proposed crime).

analogy of the joint attorney exception and pointed out that employment of certified public accountants by the corporation was for the benefit of all the stockholders.

In summary, we say this. The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance.[21]

D. Good cause.

There are many indicia that may contribute to a decision of presence or absence of good cause, among them the number of shareholders and the percentage of stock they represent; the bona fides of the shareholders; the nature of the shareholders' claim and whether it is obviously colorable; the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; whether, if the shareholders' claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality;

[21] This approach is neither new nor world-shaking. At common law the stockholder has the right to see corporate books and records but it is not unlimited. His demand must be germane to his interest as stockholder, and the interests of the corporation and other shareholders may control to deny inspection. 5 Fletcher, Corporations, § 2218 at 799 (1967). The existent Alabama statute, which follows the Model Business Corporation Act, allows shareholder examination of books and records of account, minutes and record of stockholders, upon written demand, and "for any proper purpose." Tit. 10, § 21(46), Code of Ala. (Supp. 1969).

whether the communication related to past or to prospective actions; whether the communication is of advice concerning the litigation itself; the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons. The court can freely use *in camera* inspection or oral examination and freely avail itself of protective orders, a familiar device to preserve confidentiality in trade secret and other cases where the impact of revelation may be as great as in revealing a communication with counsel.

The order relating to availability of the attorney-client privilege is vacated. The cause is remanded for further proceedings not inconsistent with this opinion.

---

**Rule 26(b)(1) of the Federal Rules of Civil Procedure** (as recently amended):

(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) **In General.** Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence;

**Rule 26(c) of the Federal Rules of Civil Procedure** (as recently amended):

> (c) **Protective Orders.** Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

**Rule 34 of the Federal Rules of Civil Procedure,** as it existed prior to recent amendments:

> Upon motion of any party showing good cause therefor and upon notice to all other parties, and subject to the provisions of Rule 30(b), the court in which an action is pending may (1) order any party to pro-

duce and permit the inspection and copying or photographing, by or on behalf of the moving party, of any designated documents, papers, books, accounts, letters, photographs, objects, or tangible things, not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in his possession, custody, or control; or (2) order any party to permit entry upon designated land or other property in his possession or control for the purpose of inspecting, measuring, surveying, or photographing the property or any designated object or operation thereon within the scope of the examination permitted by Rule 26(b). The order shall specify the time, place, and manner of making the inspection and taking the copies and photographs and may prescribe such terms and conditions as are just.

**Rule 43(a) of the Federal Rules of Civil Procedure:**

(a) **Form and Admissibility.** In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

Section 43 of the Alabama Business Corporation Act:

—Each corporation shall keep correct and complete books and records of account and shall keep written minutes of the proceedings of its stockholders and board of directors, and shall keep at its principal office, or at the office of its transfer agent or register, a record of its stockholders, giving the names and addresses of all stockholders and the number and class of the shares held by each.

Any person who shall have been a stockholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes, and record of stockholders and to make extracts therefrom.

Any officer or agent who, or a corporation which, without reasonable cause, shall refuse to allow any such stockholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of stockholders, for any proper purpose, shall be liable to such stockholder in a penalty of ten per cent of the value of the shares owned by such stockholder, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of stockholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of stockholders of such corporation

or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a stockholder of proper purpose, irrespective of the period of time during which such stockholder shall have been a stockholder of record, and irrespective of the number of shares held by him to compel the production for examination by such stockholder of the books and records of account, minutes, and record of stockholders of a corporation.

Upon the written request of any stockholder of a corporation, the corporation shall mail to such stockholder its most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations.

**Section 420, Title 7, Code of Alabama of 1940:**

—No attorney or his clerk shall be competent or compelled to testify in any court in this state, for or against the client, as to any matter or thing knowledge of which may have been acquired from the client, or as to advice or counsel to the client given by virtue of the relation as attorney or given by reason of anticipated employment as attorney, unless called to testify by the client, but shall be competent to testify, for or against the client, as to any matter or thing knowledge of which may have been acquired in any other manner.

**Title 1, §2, Code of Alabama (1940):**

—The common law of England, so far as it is not inconsistent with the Constitution, laws and institutions of this state, shall, together with such institutions and laws, be the rule of decisions, and shall continue in force, except as from time to time it may be altered or repealed by the legislature.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

---

No. 1161

---

A. L. GARNER, ET AL., *Petitioners*,

v.

FIRST AMERICAN LIFE INSURANCE COMPANY,
*Respondent.*

---

## BRIEF OPPOSING A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

### RELEVANT STATUTES AND RULES

Title 10, §21(46), Code of Alabama (1940) is reproduced *infra* at p. A-1.

### STATEMENT OF THE CASE

Petitioners' statement is supplemented as follows:

Petitioners seek by discovery processes to reach confidential communications between the respondent Corporation and its attorney relevant to the matter in issue. Petitioners are undertaking to prove a conspiracy to violate laws prior to and in the acts of selling stock to them. Their suit seeks to impose liability

on the Corporation because of illegal acts claimed to have been committed before they were stockholders or had any rights as such. Petitioners seek to require their corporate adversary to open to them its confidential files of what had gone on before.

The documents and disclosures sought are not within the records open to them by state statute (Code of Alabama (1960), Title 10, § 21(66)). Their purpose is not recognized as a proper one under the common law (6 Fletcher, *Cyclopedia of the Law of Private Corporations*, 1967 Revised Vol., § 2218, p. 789).

The District Court held that there is no attorney-client privilege available to a corporation in a suit by stockholders. The rationale of the two English authorities relied on by the District Court (*Gouraud* v. *Edison Gower Bell Telephone Company of Europe, Limited*, 57 L. T. Ch. 498, 30 L. T. 813 (1888), and *W. Dennis & Sons, Ltd.* v. *West Norfolk Farmers Manure & Chemical Company, Ltd.*, 3 A.11 E. R. 94, 112 L. J. Ch. 239, 169 L. T. 74, 59 TLR 298, 89 Sol. Jo. 211 (1943)), is a simple one. The stockholders' money paid for the opinion of the attorney and the opinion of the attorney is therefore available to the stockholders.

## ARGUMENT OPPOSING CERTIORARI

The District Court's application of so radical a rule would effectively destroy the attorney-client relationship as it exists in today's business world. In the case of widely held public corporations, access as a matter of right by every stockholder to communications with attorneys is equivalent to public access. The ruling of the Court of Appeals merely tempered the unjustified abrogation of the attorney-client privilege.

More than adequate recourse is reserved to the stockholders if justification be shown.

The Circuit Courts in some measure thereby restored operation of a privilege which has been universally recognized as public policy in this nation. Illustrative of such recognition is the statement concerning letters from an attorney to his client made by the Supreme Court of Alabama in *Gaines* v. *Fear*, 163 Ala. 358, 50 So. 1000, as follows:

> "Such matters are among, if they are not, the most privileged; and the cases are very rare, if any there be, where these secrets should be revealed by compulsion as was done in this case."

There is no conflict among Circuits. The contrary rulings from other District Courts all "dominoed" from the ruling in this case as a result of significant efforts by counsel for petitioners. The question was an important one only so long as the District Court's order remained uncorrected. Prior to the District Court ruling the Seventh Circuit's statement in *Radiant Burners, Inc.* v. *American Gas Association*, 320 F. 2d 314, cert. denied 375 U.S. 929 (1963), could have been applied accurately to the precise question here:

> "it is obvious to us that no litigant has heretofore thought that there was merit enough in the proposal to warrant a challenge to the availability of the privilege to a corporation."

The Circuit Court's ruling in nowise contravenes any changed rules. The conflict posed by petitioners is specious. The liberalized discovery effected by amendments to Rule 34 and 26 of the Federal Rules of Civil Procedure is explicitly applicable to matters "not privileged". The limitation of a privilege is an entirely different thing.

It is equally clear that the Circuit Court's solution does not place so "staggering" a burden on the district courts as petitioners would suggest. District Judges have long experience in dealing with determination of "good cause". The body of case law springing from *Hickman* v. *Taylor*, 329 U.S. 495, is not wholly satisfactory, but it illustrates some exposure by judges to comparable problems. The judge's determination as required by the Fifth Circuit's opinion should be a great deal less difficult than those required in *Hickman* situations. In the first place, it is limited to stockholder suits which are comparatively rare. Secondly, the "good cause" ("necessity" or "justification" is a more descriptive characterization) for disallowing a claim of privilege should be notably more clear cut than "good cause" for disallowing a nonprivileged, qualified immunity from discovery. In any event it is a clearly manageable part of the judge's responsibility in supervising pretrial discovery.

## CONCLUSION

If the Fifth Circuit erred it did so by infringing on the inviolate character of the attorney-client privilege. Certiorari should be denied.

Respectfully submitted

ROBERT S. VANCE
933 Frank Nelson Building
Birmingham, Alabama 35203

*Of Counsel:*

CALLAWAY & VANCE
933 Frank Nelson Building
Birmingham, Alabama 35203

# APPENDIX

## 1940 Code of Alabama, Recom. 1952. Title 10.

§ 21 (46). Books and records of corporation.—Each corporation shall keep correct and complete books and records of account and shall keep written minutes of the proceedings of its stockholders and board of directors; and shall keep at its principal office, or at the office of its transfer agent or register, a record of its stockholders, giving the names and addresses of all stockholders and the number and class of the shares held by each.

Any person who shall have been a stockholder of record for at least six months immediately preceding his demand or who shall be the holder of record of at least five per cent of all the outstanding shares of a corporation, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes, and record of stockholders and to make extracts therefrom.

Any officer or agent who, or a corporation which, without reasonable cause, shall refuse to allow any such stockholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of stockholders, for any proper purpose, shall be liable to such stockholder in a penalty of ten per cent of the value of the shares owned by such stockholder, in addition to any other damages or remedy afforded him by law. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of stockholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of stockholders for any such purpose, or has improperly used any information secured through any prior examination

of the books and records of account, or minutes, or record of stockholders of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

Nothing herein contained shall impair the power of any court of competent jurisdiction, upon proof by a stockholder of proper purpose, irrespective of the period of time during which such stockholder shall have been a stockholder of record, and irrespective of the number of shares held by him, to compel the production for examination by such stockholder of the books and records of account, minutes, and record of stockholders of a corporation.

Upon the written request of any stockholder of a corporation, the corporation shall mail to such stockholder its most recent financial statements showing in reasonable detail its assets and liabilities and the results of its operations. (1959, p. 1073, § 46, appvd. Nov. 13, 1959.)

SUPREME COURT, U. S.
FILED
FEB 5 1971
E. ROBERT SEAVER, CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1161

A. L. GARNER, et. al., Petitioners

v.

FIRST AMERICAN LIFE INSURANCE COMPANY, Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

# BRIEF OF AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN OPPOSITION

EDWARD L. WRIGHT
2200 Worthen Bank Building
Little Rock, Arkansas 72201
*President, American Bar Association*

ALEXANDER L. NICHOLS
3000 du Pont Building
Wilmington, Delaware 19801
*Member, Board of Governors, American Bar Association*

*Of Counsel:*

ORVEL SEBRING
GREGORY M. HARVEY
2107 The Fidelity Building
Philadelphia, Pa. 19109

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

## TABLE OF CONTENTS


PAGE

TABLE OF AUTHORITIES CITED ..... ii

OPINIONS BELOW ..... 1

JURISDICTION ..... 2

INTEREST OF THE AMICUS ..... 2

QUESTIONS PRESENTED FOR REVIEW ..... 2

STATEMENT OF THE CASE ..... 3

The Court of Appeals held that the attorney-client privilege is available to a corporation in litigation against the corporation by its stockholders, subject to the right of a stockholder to show good cause why the privilege should not be invoked in a particular instance.

ARGUMENT ..... 7

I. The Court should defer review of any questions raised by the requirement that a stockholder show good cause to obtain discovery of attorney-client communications ..... 7

II. The decision below is correct in holding that a corporation is not barred from invoking the attorney-client privilege merely because those seeking information are stockholders ..... 10

III. The decision below is correct in holding that a corporation is a client for the purpose of invoking the attorney-client privilege ..... 11

CONCLUSION ..... 14

Certiorari should be denied.

## Table of Authorities Cited

Cases: PAGE

Connecticut Mutual Life Ins. Co. *v.* Schaefer, 94 U.S. 457 ..... 13

Dahlke *v.* Morrison, CCH Fed. Sec. L. Rep. ¶ 92,490 (N.D. Ala. Oct. 3, 1969) ..... 9

Decker *v.* Harper & Row Publishers, Inc., 423 F.2d 487 (7th Cir.), *cert. granted*, 397 U.S. 1073 (1970), *aff'd by an evenly divided Court*, 91 S. Ct. 351 (Jan. 12, 1971) ..... 13

Fischer *v.* Wolfinbarger, 45 F.R.D. 510 (W.D. Ky. 1968) ..... 8

George Campbell Painting Corp. *v.* Reid, 392 U.S. 286 ..... 11

Gourand *v.* Edison Gower Bell Telephone Co., 57 L.T. Ch. 498, 59 L.T. 813 (1888) ..... 11

Hale *v.* Henkel, 201 U.S. 43 ..... 11

The Queen *v.* Cox, 14 Q.B.D. 153 (1884) ..... 8

Radiant Burners, Inc. *v.* American Gas Ass'n, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963) 13

United States *v.* Bob, 106 F.2d 37 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939) ..... 8

United States *v.* Louisville & Nashville R.R., 236 U.S. 318 ..... 13

United States *v.* White, 322 U.S. 694 ..... 12

Miscellaneous:

Burnham, "The Attorney-Client Privilege in the Corporate Arena," 24 Bus. Lawyer 901, 911 (1969) 9

Fed. R. Civ. P. 34 ..... 8

8 Wigmore, Evidence § 2291, p. 545 (McNaughton rev. 1961) ..... 12

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1970

No. 1161

A. L. GARNER, et. al.,

*Petitioners*

*v.*

FIRST AMERICAN LIFE INSURANCE COMPANY,

*Respondent.*

*On Petition For a Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit*

## BRIEF FOR AMERICAN BAR ASSOCIATION AS AMICUS CURIAE IN OPPOSITION

## OPINIONS BELOW

The opinion of the Court of Appeals vacating the order of the District Court and remanding the cause for further proceedings is printed in the Appendix to the Petition at page A-4 and reported at 430 F.2d 1093. The order of the District Court is printed in the Appendix to the Petition at page A-1 and reported at 290 F. Supp. 1018.

## JURISDICTION

The judgment of the Court of Appeals was filed on August 31, 1970. A timely Petition for Rehearing was denied without opinion on September 29, 1970, and the Petition for a Writ of Certiorari was filed on December 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## INTEREST OF THE AMICUS

The American Bar Association ("ABA") sought leave to file a brief amicus curiae in the Court of Appeals in order to bring to the attention of that Court the probable effect of the decision of the District Court upon the practice of law both within and without the Fifth Circuit and the detrimental effect of the District Court decision upon the public interest. Leave having been granted, the ABA filed a brief and subsequently presented oral argument. This Brief in Opposition is filed with the written consent of petitioners and respondent to express the position of the ABA that certiorari should be denied.

## QUESTIONS PRESENTED FOR REVIEW

1. Whether stockholders of a corporation engaged in litigation against the corporation, its officers and directors, must establish good cause in order to compel disclosure during pre-trial discovery of confidential communications between the corporation and its attorneys.

2. Whether a corporation may assert the attorney-client privilege to protect confidential communications between the corporation and its attorneys against compulsory disclosure in litigation commenced by parties who are not stockholders of the corporation.

## STATEMENT OF THE CASE

The decision below was rendered in an appeal under 28 U.S.C. § 1292(b) from an order of the United States District Court for the Northern District of Alabama, Southern Division, holding that the attorney-client privilege was "not available" to a corporation in litigation commenced against the corporation by stockholders.

The Court of Appeals reversed the order of the District Court and remanded the cause for further proceedings, stating that:

> "The attorney-client privilege still has viability for the corporate client. The corporation is not barred from asserting it merely because those demanding information enjoy the status of stockholders. But where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be invoked in the particular instance." (Appendix A-22, 430 F.2d at 1103-04; footnote omitted.)

The civil action in which the issue arose was commenced by stockholders of First American Life Insurance Company ("First American"), an Alabama corporation, against the corporation, its officers and directors, for alleged violations of federal and state securities acts and under state law for fraud. Claims were asserted both directly for an award of damages to the stockholders and derivatively for damages to the corporation.

The pre-trial discovery proceedings which resulted in the order of the District Court involved attempts by the plaintiffs to obtain discovery of confidential communications between the corporation and attorneys for the corpo-

ration, both by production of documents and by questions asked during a deposition on oral examination of an attorney for the corporation. Examples of the questions to which the plaintiffs sought to compel answers are as follows:

> "(4) 'Q. Did you express an opinion to the company that, in view of the SVC's question of the transaction, that you would have to modify the opinion as expressed in Plaintiffs' Exhibit 5?'"
>
> • • • • •
>
> "(9) 'Q. I'm asking for your opinion, based upon facts which you knew in March of 1966 or statements of facts or reports of reported facts that had come to your attention as of that date.'"

Counsel representing the corporation in the discovery proceedings, who was not the counsel involved in the confidential communications sought to be discovered, invoked the attorney-client privilege of the corporation.

In the District Court the plaintiffs did not question the availability of the attorney-client privilege as to parties other than stockholders with respect to the communications which they sought to discover. Instead, the plaintiffs took the position, as stated in their Motion to Compel Answers, that:

> "they are stockholders of First American Life Insurance Company, and that there is no privilege as against plaintiffs with respect to communications between First American Life Insurance Company and any of its counsel."

The District Court held that the attorney-client privilege was "not available as against plaintiff stockholders," citing an English case decided in 1888 and another English

case decided in 1943. The court later supplemented its order with language permitting an immediate appeal under 28 U.S.C. § 1292(b).

Prior to any proceedings in the Court of Appeals, an equity proceeding commenced in the appropriate state court by the Alabama Superintendent of Insurance resulted in the appointment of a "Judicial Agent" to take possession of the assets of First American and operate its business, express authority being also granted to the Agent to defend the litigation commenced by the instant plaintiffs. In the Court of Appeals, counsel for the Judicial Agent sought reversal of the order of the District Court and noted that First American, under the control of the Agent, had asserted claims against former officers and directors of the corporation which were similar to the claims asserted by the instant plaintiffs.

Counsel for the American Bar Association filed a motion for leave to file a brief *amicus curiae* with the Court of Appeals stating that:

> "The order of the court below does not discuss the effect of such a decision upon the legal profession, the interests of clients of the legal profession and the public interest, but instead relies upon two English cases, both of which are based largely upon an obsolete analysis of stockholders' property rights.
>
> "The American Bar Association, as the most broadly representative professional association of lawyers within the United States, seeks leave to file a brief amicus curiae in order to bring to the attention of this Court the probable effect of the decision below upon the practice of law both within and without this Circuit and the detrimental effect of the decision below upon the public interest."

The brief filed on behalf of the ABA urged reversal on the ground that the public interest in effective legal

representation which requires an attorney-client privilege also requires that the privilege extend to communications between corporations and their attorneys without compulsory disclosure to complaining stockholders.

Counsel for the plaintiffs responded in their brief to the ABA position by suggesting that "any legitimate corporate interest in non-disclosure of communications with the corporation's attorneys can be protected by requiring the showing of good cause" (Argument Heading B., Reply Brief for Appellants-Petitioners and Cross-Appellees, A. L. Garner, et al., p. 11). After referring specifically to the ABA brief, the plaintiffs replied:

> "Implicit in this argument is the suggestion that if the decision of the lower court is sustained in this case, then a corporation's management will not feel free to consult fully and frankly with the corporation's attorneys because of the fear of some future, baseless stockholder suit.
>
> "The short answer to this contention is that the courts can adequately protect the corporation in situations where a stockholder-plaintiff fails to show good cause for the production of communications with counsel." (*Ibid.*)

The Court of Appeals, summarizing its holding in the language quoted in full at page 3 above, held that a corporation was not barred from asserting the attorney-client privilege merely because those demanding information are stockholders, but that the availability of the privilege was subject in such cases "to the right of the stockholders to show cause why it should not be invoked in the particular instance," and listed "many indicia that may contribute to a decision of presence or absence of good cause." The order of the District Court was vacated and the cause remanded for further proceedings

## ARGUMENT

**I. The Court should defer review of any questions raised by the requirement that a stockholder show good cause to obtain discovery of attorney-client communications.**

Four of the six numbered Questions for Review in the Petition (pp. 2-3) challenge that portion of the decision of the Court of Appeals which holds that stockholder plaintiffs have the burden to establish "good cause" for disclosure of confidential communications otherwise protected by the attorney-client privilege. Those questions refer primarily to purported difficulties in the application of the requirement of good cause to particular cases. Both the requirement of good cause and the assignment to the stockholder plaintiffs of the burden of establishing that requirement were suggested below by the instant petitioners as an appropriate means to limit the impact of disclosure on the interests sought to be fostered by the attorney-client privilege. (Reply Brief, p. 11, quoted above at p. 6). Petitioners' present position that review should be allowed principally on questions arising from the requirement of good cause is accordingly less than persuasive.

Even if petitioners had consistently opposed the requirement of good cause, review of that portion of the decision below should not be granted in the instant case.

First, the instant case is particularly inappropriate to test any difficulties of administration which may be created by the requirement of good cause. If petitioners' are correct that the evidence already developed in the instant case confirms their allegations "concerning payoffs to state officials" and other similar conduct (Petition, pp. 6-7), the District Court should have little difficulty in determining whether the instant plaintiffs have carried their burden. Under such circumstances a party might well be entitled to disclosure under the usual exception to the

attorney-client privilege for communications "about a crime or fraud to be committed," *United States v. Bob*, 106 F.2d 37, 40 (2d Cir.), *cert. denied*, 308 U.S. 589 (1939), citing *The Queen v. Cox*, 14 Q.B.D. 153 (1884), regardless of his status as a stockholder.[1]

Second, a determination of the general question of whether the requirement of good cause will impose "undue burdens on the federal courts" (Petition, p. 10) might more appropriately occur after one or more federal courts have attempted to apply the rule to particular facts. A consistent and firm administration of the requirement of good cause may tend to eliminate many of the concerns which caused the amicus to support an outright reversal of the decision of the District Court and the application to stockholder litigation of the same attorney-client privilege available to a corporation in litigation with parties who are not stockholders, subject also to the same exceptions. An erratic administration of the requirement of good cause, on the other hand, might gravely interfere with the counseling relationship between corporations and their attorneys and suggest the adoption by this Court of a more restrictive rule.

There is no present conflict of appellate decisions which requires resolution by this Court. The cases cited in the Petition (pp. 15-16) were each decided by a District Court either without opinion or with a short opinion relying on the decision by the District Court in the instant case. Most of those cases involve either the same alleged conspiracy and some of the same parties as the instant case, *e.g.*, *Fischer v. Wolfinbarger*, 45 F.R.D. 510 (W.D. Ky. 1968), or the same counsel who represent the plaintiffs

[1] Petitioners asserted below that they had established good cause for the production of documents as required by former Fed. R. Civ. P. 34, prior to the amendment of March 30, 1970, 398 U.S. 997, although no language relevant to that issue appears in the order of the District Court. Petitioners appear to agree with the understanding of the amicus that the "good cause" required to be shown by the Court of Appeals to avoid the attorney-client privilege, pursuant to the indicia described by the Court of Appeals, is not similar to the good cause formerly required by Rule 34.

in the instant case, *e.g.*, *Dahlke* v. *Morrison*, CCH Fed. Sec. L. Rep. ¶ 92,490 (N.D. Ala. Oct. 3, 1969), and the appearance of a substantial body of precedent on this point is largely illusory.

Third, the appointment of a Judicial Agent, in effect a receiver, for respondent First American, and the Agent's subsequent assertion of claims against the former officers and directors of First American, also renders the instant case less appropriate for review. The financial resources ordinarily available to a viable corporation to resist the plaintiffs' position on the merits are not available to the instant respondent, a corporation alleged by petitioners to be insolvent. The corporation's interest in preventing disclosure of the communications sought by the plaintiffs is certainly less substantial in the instant case than in the typical case in which a corporation is attempting to defend the correctness of the actions taken by its officers and directors, rather than asserting claims against those parties.

The appointment of the Judicial Agent has also removed from the instant case the question of whether the officers and directors of a corporation should be allowed to invoke the attorney-client privilege if they are themselves subject to suit, or whether the corporation should be represented for those purposes "by a neutral party . . . ." as suggested in Burnham, "The Attorney-Client Privilege in the Corporate Arena," 24 Bus. Lawyer 901, 911 (1969). The respondent is now in the control of a court-appointed Agent who has ratified the corporation's assertion of the attorney-client privilege.

The amicus agrees with petitioners that the matters decided below are of great importance to the administration of justice and to the legal profession. The very importance of these matters suggests to the amicus, however, that this Court should grant review in a more appropriate and typical case, and after the lower courts in the

Fifth Circuit and elsewhere have accumulated experience in the administration of the requirement of good cause, rather than in the instant case.

**II. The decision below is correct in holding that a corporation is not barred from invoking the attorney-client privilege merely because those seeking information are stockholders.**

The Court of Appeals correctly held that mere ownership of stock in a defendant corporation does not entitle a plaintiff to obtain disclosure of the corporation's attorney-client communications. Petitioners position in this Court that their stock ownership should automatically entitle them to such disclosure cannot be sustained and is not a sufficient ground on which to grant review.

Unless a corporation is to be denied any attorney-client privilege whatsoever (as also urged by the petitioners), some procedure must exist to determine in a particular case whether the interest of the plaintiff stockholder in disclosure should overcome the interest in effective legal representation which is the origin of the attorney-client privilege. Petitioners' argument to the contrary appears to assume that the interests of a single stockholder plaintiff are always identical with the interests of the corporation. The Court of Appeals explicitly recognized that such an identity of interests might not exist even if the only interests to be accorded legal recognition are the interests of the stockholders, since the interests of nonparty stockholders

> "may be affected by impinging on the privilege, sometimes injuriously (though not necessarily so—in some situations shareholders who are not plaintiffs may benefit). The corporation is vulnerable to suit by shareholders whose interests or intention may be inconsistent with those of other shareholders, even others consisting a majority" (A-[illegible] n.17, 430 F.2d at 1101 n.17).

The interests of the stockholders, moreover, are not the only interests which should be accorded legal recognition on this issue—there may in addition be interests of employees, general creditors, policyholders (in the case of the respondent insurance company), and others in contractual relationships with the corporation, which interests may be different from or contrary to the interests of the particular stockholder or stockholders who have brought suit against the corporation, and which interests may be affected in particular cases by a forced disclosure of otherwise confidential attorney-client communications.[8]

The opinion of the Court of Appeals not only shows a thorough consideration of these various interests but also establishes a sound procedure by which conflicts between them may be resolved.

**III. The decision below is correct in holding that a corporation is a client for the purpose of invoking the attorney-client privilege.**

Petitioners seek to reverse the holding below that a corporation is a client which may invoke the attorney-client privilege "in view of" a recent decision holding that a corporation may not invoke the constitutional privilege against self-incrimination.

But that decision, *George Campbell Printing Corp.* v. *Reid*, 392 U.S. 286, 288, does not change the prior law on self-incrimination. At least since *Hale* v. *Henkel*, 201 U.S. 43, 74-75, cited in the *George Campbell* decision, 392 U.S. at 289, a corporation has not been entitled to claim the federal constitutional privilege against self-incrimination.

---

[8] Even the English *nisi prius* decision on which petitioners principally rely, and in which the plaintiff was "the holder of nearly one-half the capital," *Gouraud* v. *Edison Gower Bell Telephone Co.*, 57 L.T. Ch. 498, 59 L.T. 813, 814 (1888), recognized that the court must reserve the power to refuse disclosure:

> "of course, if the plaintiff's *bona fides* were in any way impeached, and the object of the inspection were to trump up a case, the court might, in the exercise of its discretion, refuse inspection." (Emphasis in the original.)

The modern rationale of the distinction in this respect between a corporation and other organizations, on the one hand, and a natural person on the other hand, was stated in *United States v. White*, 322 U.S. 694, 698-99, in which the privilege against self-incrimination was held not applicable to a labor union:

> "The constitutional privilege against self-incrimination is essentially a personal one, applying only to natural individuals . . . It is designed to prevent the use of legal process to force from the lips of the accused individual the evidence necessary to convict him or to force him to produce and authenticate any personal documents or effects that might incriminate him. Physical torture and other less violent but equally reprehensible modes of compelling the production of incriminating evidence are thereby avoided.
>
> • • • • •
>
> "Since the privilege against self-incrimination is a purely personal one, it cannot be utilized by or on behalf of any organization, such as a corporation."

The reasons for the attorney-client privilege, however, apply equally to organizations, including corporations, and to natural persons. The modern policy which supports the attorney-client privilege is stated in 8 Wigmore, Evidence § 2291, p. 545 (McNaughton rev. 1961):

> "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent."

No argument is necessary to establish that organizations of many types, including corporations, must and should obtain legal advice.

Decisions by this Court have used substantially the same language in supporting the availability of the priv-

ilege for both natural persons and corporations. Compare *Connecticut Mutual Life Ins. Co.* v. *Schaefer*, 94 U.S. 457, involving a natural person,[3] with *United States* v. *Louisville & Nashville R.R.*, 236 U.S. 318, involving a corporation.[4]

The same argument by analogy to the privilege against self-incrimination now advanced by petitioners was also made to the Court of Appeals in *Radiant Burners, Inc.* v. *American Gas Ass'n*, 320 F.2d 314 (7th Cir.), *cert. denied*, 375 U.S. 929 (1963), which concluded that the analogy was not proper because of the different reasons for the two privileges:

> "the attorney-client privilege derives from a regard for the *rights of a client, personal or impersonal* in character, fostering a social policy concerned with facilitating the working of justice." 320 F.2d at 322-23. (Emphasis added.)

Nor does the instant case offer an opportunity to resolve the issues presented by *Decker* v. *Harper & Row Publishers, Inc.*, 423 F.2d 487 (7th Cir.), *cert. granted*, 397 U.S. 1073 (1970), *aff'd by an evenly divided Court*, 91 S. Ct. 351 (Jan. 12, 1971), other than by the Draconian solution of totally eliminating the attorney-client privilege for corporations and other impersonal entities. At no point in the proceedings below did any party or the amicus or

---

[3] "If a person cannot consult his legal adviser without being liable to have the interview made public the next day by an examination enforced by the courts, the law would be little short of despotic. *It would be a prohibition upon professional advice and assistance.*" 94 U.S. at 457. (Emphasis added.)

[4] "The desirability of protecting confidential communications between attorney and client as a matter of public policy is too well known and has been too often recognized by text-books and courts to need extended comment now. If such communications were required to be made the subject of examination and publication, *such enactment would be a practical prohibition upon professional advice and assistance.*" 236 U.S. at 336. (Emphasis added.)

the Court of Appeals make "any distinction between the client's communications to the attorney and the attorney's communications to the client" (A-6 n.7, 320 F.2d at 1096 n.7), or any distinction involving the status within the corporation of the persons who had made and received the communications to and from the attorneys. The "control group" issue argued in the *Decker* case is therefore not presented in the instant case.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD L. WRIGHT
President, American Bar Association

ALEXANDER L. NICHOLS
Member, Board of Governors
American Bar Association

*Attorneys for the American Bar Association as amicus curiae*

Of Counsel:
ORVEL SEBRING
GREGORY M. HARVEY